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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH ALLEN SHARONOFF,

Defendant and Appellant.

C066292

(Super. Ct.
No. P10CRF0036)

Defendant Kenneth Allen Sharonoff was living at a homeless camp in Placerville when he shot to death another resident of the camp, 68-year-old Clark McCabe. A jury convicted defendant of one count of second-degree murder, one count of elder abuse resulting in death, two counts of possession of a firearm by a felon, and one count of possession of ammunition by a felon. The jury also found various enhancement allegations to be true, including the personal discharge of a firearm resulting in death and the personal infliction of great bodily injury. Following a bifurcated hearing, the trial court found that defendant had been convicted of two prior strike offenses within the meaning

of the three strikes law (Pen. Code, §§ 667, subd. (b)-(i), 1170.12). The trial court sentenced defendant to an indeterminate term of 70 years to life plus a consecutive determinate term of 10 years in state prison and imposed other orders.

On appeal, defendant contends the trial court prejudicially erred and violated his constitutional rights by (1) admitting into evidence two prior convictions for assault with a deadly weapon for the limited purpose of establishing defendant's intent to kill, and (2) failing to instruct the jury on the theory of imperfect self-defense as a means of mitigating murder to voluntary manslaughter. We disagree and affirm.

FACTS

In January 2010, defendant lived in a homeless camp behind Prospector's Plaza in Placerville. The makeshift camp was set up in a field of manzanita and other scrub vegetation. Several worn paths led to the various campsites. The "mayor" of the camp was a 68-year-old man named Clark McCabe, who also went by the name "Otto." According to Tommy Aldrich, another camp resident: "Otto was like the senior of the camp. He was everyone's -- he had, you know, like authority like who could go, who could stay, and he was just like the peacekeeper of the camp." Paul Oakes and his mother also lived at the camp; Oakes went by the name "Cody" and was one of defendant's friends. The

camp was also home to Jeremiah Rands and his girlfriend Heather Whitney.¹

On the evening of January 23, 2010, Tommy was visiting Jeremiah and Heather at their campsite when defendant arrived carrying an old, rusted, single-action black powder revolver. Defendant appeared to be drunk and waved the gun around while "ranting and raving about something." The weapon was cocked and ready to fire. When defendant put his arms around Tommy, resting the gun on his shoulder, Tommy asked defendant to put the gun away. Defendant apologized and complied with the request, placing the gun in his pants.

Later that night, defendant was at his campsite when Cody arrived and asked if he wanted to watch a movie. Defendant declined, explaining that Otto had his crossbow, and that he wanted to get it back so he could sell the weapon. Cody agreed to meet defendant at Otto's camp, but first needed to get some water from his campsite. Both defendant and Cody were wearing head lamps to allow them to navigate the dark trails through the camp. A few minutes later, as Cody approached Otto's campsite after retrieving a water jug, he heard defendant and Otto arguing over the crossbow. Defendant demanded: "I want my crossbow back." Otto responded: "No, you can't have it. You owe me money." By this point, Cody could see defendant pointing

¹ We will refer to Clark McCabe and Paul Oakes by their respective nicknames, Otto and Cody. We will refer to the other camp residents by their first names.

a gun at Otto's head. Defendant pulled back the hammer and said: "Oh, yeah?" Otto replied: "You just made the biggest mistake of your life." And as Otto pulled what appeared to be a cell phone out of his pocket, defendant pulled the trigger. He then pulled back the hammer and fired a second shot as Otto fell to the ground.

Each round delivered a fatal wound. The first round struck Otto in the chest, penetrating both lungs and lodging behind his shoulder blade. This wound caused Otto to begin to convulse and slowly collapse. The second round entered Otto's lower back as he doubled over, penetrated the spleen and left lung and lodged beneath the collarbone. Otto died as a result of these injuries.

Defendant then ran up a hill through a nearly impassable trail. Shaken up by what he had seen, Cody slowly walked to defendant's camp to find out what "actually happened." When he arrived a few minutes later, defendant was rustling around in his tent. Jeremiah then showed up and asked if they wanted to hang out at his campsite. Defendant said that "he'd be right over," so Cody and Jeremiah walked to Jeremiah's campsite together. After Cody told Jeremiah about the shooting, they decided to wait for defendant to arrive at the campsite, and then Jeremiah would walk down to Cody's mother's campsite to inform her of the situation. Defendant arrived 10 to 15 minutes later. Jeremiah excused himself to use the restroom and walked to Cody's mother's campsite. Acting on her advice, Jeremiah walked to Otto's camp to make sure this was not a prank.

Finding Otto motionless on the ground, Jeremiah ran back to his campsite to make sure Heather was safe. He then took her cell phone, again pretended he needed to use the restroom, and called Cody's mother on her cell phone to tell her Otto was dead.

Deputies from the El Dorado County Sheriff's Department responded to a 911 call reporting the shooting. The camp was cleared early the next morning and its inhabitants detained for questioning. Otto's body was also recovered. Later in the day, Cody assisted the officers in an unsuccessful search for defendant's revolver. Cody resumed the search the following day with four camp residents and eventually found the gun in the manzanita field near a place defendant had previously used to stash drugs. Leaving the gun in place, Cody called the sheriff's department and deputies came out to retrieve the weapon.

Defendant's campsite was searched pursuant to a search warrant. Deputies recovered several lead balls, five of which were covered with black powder, some .38 caliber cartridges, a spent shotgun shell casing, and a homemade zip gun.

DISCUSSION

I

Evidence Code Section 1101

Defendant contends the trial court prejudicially erred and violated his constitutional rights by admitting into evidence two prior convictions for assault with a deadly weapon for the limited purpose of proving his intent to kill. We disagree.

Prior Convictions

On March 23, 1986, defendant was 18 years old and lived with his mother, Pat Thompson. Kim Thornton and her three children also lived with Thompson, who allowed the four-some to move in because of marital problems between Thornton and her husband, Ralph Hoxie. Hoxie stopped by to see the children and ended up in an argument with Thornton at the front door. After several minutes of arguing, Thornton asked Hoxie to leave. He continued to argue with her. Defendant then came to the front door with a black powder revolver, pointed the gun at Hoxie's face, and pulled the trigger. Hoxie turned and ran as the shot was fired, causing the bullet to graze his neck about two inches below his left ear. Based on these facts, defendant pled no contest to one count of assault with a deadly weapon and was placed on formal probation for a period of five years.

On June 27, 1994, defendant was 26 years old and lived in a camper on Harry Rehder's property. Dennis O'Brien and Phil Chassey, an elderly man "somewhere in his early 80s," were also at the property that day. Defendant and Chassey got into a heated argument resulting in defendant picking up a metal tractor part and hitting Chassey several times in the head. Rehder pulled defendant off of Chassey, who fell to the ground with a black eye and blood pouring from his head. O'Brien then escorted defendant across the street, where he waited for police to arrive. Based on these facts, defendant pled no contest to one count of assault with a deadly weapon and was sentenced to three years in state prison.

Over defendant's objection, the trial court admitted testimony regarding these prior offenses under Evidence Code section 1101, subdivision (b), for the limited purpose of establishing defendant's intent to kill. The jury was instructed that it could consider this evidence only if the People proved by a preponderance of the evidence that defendant committed these prior offenses. The jury was also instructed that it could, but was not required to, consider this evidence for the limited purpose of deciding whether defendant acted with the intent to kill in this case. The jury was further instructed to consider the similarity or lack of similarity between the prior offenses and the charged offenses, and admonished that it could not use this evidence to conclude that defendant possessed a bad character or was predisposed to committing crimes.²

² The instruction provided in full: "The People are going to present evidence that the Defendant committed other offenses that are not charged in this case, and you may consider this evidence only if the People have proved, by a preponderance of the evidence, that the uncharged acts -- that the Defendant, in fact, committed the uncharged acts. [¶] Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the Defendant committed the uncharged offenses or acts, you may, but are not required to, consider that evidence for the limited purpose of deciding whether the Defendant acted with the intent to kill in this case, so it is offered for the limited purpose of determining whether or not in this case the Defendant possessed the intent to kill. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the

Analysis

Evidence Code section 1101, subdivision (a), provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." However, subdivision (b) of that section provides that a specific instance of a person's conduct is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

"When the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense with evidence he had committed uncharged offenses, the admissibility of evidence of the uncharged offenses turns on proof that the charged and uncharged offenses share sufficient distinctive common features to raise an inference of identity. A lesser degree of similarity is required to establish the existence of a

uncharged offenses or acts and the charged offenses. Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the Defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the Defendant committed the uncharged offenses or acts, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the Defendant is guilty of murder or that the crime of murder has been proved or that the specific intent of premeditated murder has been proved. The People must still prove each charge and allegation beyond a reasonable doubt."

common plan or scheme and still less similarity is required to establish intent. [Citations.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent in each instance. [Citations.] The decision whether to admit other crimes evidence rests within the discretion of the trial court. [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 23; see also *People v. Kelly* (2007) 42 Cal.4th 763, 783.)

Defendant acknowledges that “[i]ntent, along with all other elements of murder, is a material fact where a defendant pleads not guilty to the offense.” Nevertheless, he argues his 1986 and 1994 convictions for assault with a deadly weapon are insufficiently similar to the present offense to allow their admission into evidence. We are not persuaded. In each instance, an argument caused defendant to attack an unarmed man with a deadly weapon. In the 1986 offense, while defendant was not personally involved in the argument, he used the same type of weapon involved in the present offense -- a black powder revolver -- pointed the weapon at another man’s head, and pulled the trigger. In the 1994 offense, an argument with an elderly man caused defendant to pick up a tractor part and severely beat the man in the head until forcibly removed from the victim. Similarly, here, an argument with the elderly leader of the homeless camp over the return of defendant’s crossbow caused defendant to point his black powder revolver at the man’s head and pull the trigger. We conclude that these offenses are

sufficiently similar to support the inference that defendant probably acted with the same intent, i.e., the intent to kill, in each instance.

Nor did the trial court abuse its discretion under Evidence Code section 352 in finding the probative value of this evidence was not "substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Harrison* (2005) 35 Cal.4th 208, 229.) "'Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value.'" (*People v. Lindberg, supra*, 45 Cal.4th at p. 23, quoting *People v. Kelly, supra*, 42 Cal.4th at p. 783.) Here, we cannot conclude the trial court abused its discretion in finding evidence of the prior offenses had substantial probative value with respect to whether defendant possessed the requisite intent to kill. "Mental state and intent are rarely susceptible of direct proof and must therefore be proven circumstantially." (*People v. Thomas* (2011) 52 Cal.4th 336, 355.) The fact that defendant, on two similar prior occasions, had used a deadly weapon to assault a person in circumstances evincing an intent to kill, tended logically to prove that defendant also possessed the intent to kill in this case. Absent direct evidence of such an intent, the probative value of this prior crimes evidence must be considered substantial. And while, as defendant points out, these prior crimes "preceded the charged homicide by 24 years and 16 years, respectively," this does not make their

evidentiary value insubstantial due to remoteness. (See *People v. Spector* (2011) 194 Cal.App.4th 1335, 1388-1389 [upholding admission of prior crimes evidence where the oldest such crime occurred 28 years before the charged crime]; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 284-285 [more than 30 years]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [18 to 25 years].)

Moreover, the prosecutor kept the evidence relating to these prior offenses brief. Neither of the uncharged offenses was particularly inflammatory compared to the present murder charge. And, as mentioned, the trial court's limiting instructions advised the jury to consider this evidence not to prove defendant's predisposition to commit crimes, but rather to determine whether defendant acted with the intent to kill in this case. These instructions eliminated any danger of confusing the issues, or of misleading the jury. "We presume the jury followed these instructions." (*People v. Lindberg, supra*, 45 Cal.4th at p. 25; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107.) Thus, the trial court did not abuse its discretion under Evidence Code section 352.

Finally, we also reject defendant's contention that the admission of the prior offenses violated his constitutional rights to due process and a fair trial. He has failed to persuade us that his case presents an exception to the general rule that "[a]pplication of the ordinary rules of evidence does not infringe on a defendant's constitutional rights." (*People*

v. Uecker (2009) 172 Cal.App.4th 583, 599, fn. 11; *People v. Lindberg, supra*, 45 Cal.4th at p. 26.)

II

Imperfect Self-Defense

Defendant also claims the trial court prejudicially erred and violated his constitutional rights by failing to instruct the jury on the theory of imperfect self-defense as a means of mitigating murder to voluntary manslaughter. He is mistaken.

"It is well settled that the trial court is obligated to instruct on necessarily included offenses -- even without a request -- when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 715.) Thus, "a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162; *People v. Barton* (1995) 12 Cal.4th 186, 194-195.) "On appeal, we review independently whether the trial court erred in failing to instruct on a lesser included offense." (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

"Murder involves the unlawful killing of a human being with malice aforethought, but a defendant who intentionally commits an unlawful killing without malice is guilty only of voluntary manslaughter." (*People v. Blacksher* (2011) 52 Cal.4th 769, 832;

Pen. Code, §§ 187, subd. (a), 192.) "Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter." (*In re Christian S.* (1994) 7 Cal.4th 768, 771; *People v. Cruz* (2008) 44 Cal.4th 636, 664.) This doctrine "cannot be invoked, however, by a defendant whose own wrongful conduct (for example, a physical assault or commission of a felony) created the circumstances in which the adversary's attack is legally justified. [Citations.]" (*People v. Booker*, *supra*, 51 Cal.4th at p. 182, fn. omitted; see also *People v. Valencia* (2008) 43 Cal.4th 268, 288.)

Defendant argues an instruction on imperfect self-defense was supported by the evidence because Otto said, "You just made the biggest mistake of your life," and pulled something out of his pocket immediately before defendant pulled the trigger. Acknowledging that the doctrine of imperfect self-defense cannot be invoked where the defendant's actions have caused the victim to respond in a legally justified manner, defendant argues the doctrine applies in this case because he believed pulling the trigger was required to defend against Otto's "sudden escalation of force." This argument lacks even a modicum of merit.

Defendant relies on *People v. Vasquez* (2006) 136 Cal.App.4th 1176 (*Vasquez*), a case that illustrates the flaw in defendant's reasoning. There, Vasquez invited his cousin

Arechiga to join him and some of his friends in an alley. In the alley, Vasquez, who was confined to a wheelchair, accused Arechiga of having raped Vasquez's deceased younger brother. The accusation caused Arechiga to lunge at Vasquez and begin to choke him, which in turn caused Vasquez to pull a gun and shoot Arechiga. (*Id.* at pp. 1177-1178.) At Vasquez's murder trial, the trial court declined to give the jury an instruction on imperfect self-defense, concluding that Vasquez "created the need to defend himself by luring Arechiga to the alley to confront him." (*Id.* at p. 1179.) The Court of Appeal reversed, explaining: "Imperfect self-defense does not apply if a defendant's conduct creates circumstances where the victim is *legally* justified in resorting to self-defense against the defendant. [Citation.] But the defense is available when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant." (*Id.* at pp. 1179-1180.) Accordingly, while Vasquez may have been "up to no good," an instruction on imperfect self-defense was nevertheless required because it was Arechiga who "used unlawful force first." (*Id.* at p. 1180.)

Defendant argues that while the fact that he pointed a gun at Otto made him "appear to be the aggressor," the jury could have concluded this act "was indistinguishable from the earlier act of pointing the gun at Tommy; namely, both acts were criminal but [defendant] had no intent to kill either Tommy or Otto at either time and would have lowered the weapon upon

request." Defendant goes on to argue: "If the jury believed that [he] had no intent to kill at the time, and his intent merely was to scare Otto, just like he earlier scared Tommy, then Otto's act of pulling something black out of his pocket and pointing it in [defendant's] direction gave the appearance of Otto's intent to use unlawful force first. Under these circumstances, [defendant] was entitled to assert the belief, albeit unreasonable, that he was in imminent peril and needed to resort to self-defense." The flaw in this argument should be apparent from the very statement of it. The question is not whether defendant intended to kill Otto when he first pointed the gun at him, or whether his intent was simply to scare Otto into handing over the crossbow. The question is whether defendant's criminal conduct created circumstances in which Otto was legally justified in resorting to self-defense against defendant. And the answer is a resounding "yes."

Unlike *Vasquez, supra*, 136 Cal.App.4th 1176, defendant was the first to use unlawful force by pointing a revolver at Otto's head. At that point, Otto would have been legally justified in using lethal force to defend himself from defendant. (See Pen. Code, § 197 [homicide is justifiable "when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished"].) This is so regardless of whether defendant actually intended to pull the trigger. Having set up such a situation, defendant cannot assert the benefit of the doctrine

of imperfect self-defense. Nor were his constitutional rights violated by the failure to instruct on the doctrine.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.